

## Internal Revenue Service

## Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B1-PLR-150559-01

Date:

Aug 28 2002

### Legend

X =

LLC =

D1 =

D2 =

State =

Dear :

This responds to your letter dated, September 12, 2001 under § 301.9100-1(c) of the Procedure and Administration Regulations requesting to file an election to treat LLC as an association for federal tax purposes and relief under §1362(b)(5) of the Internal Revenue Code.

### Facts

According to the information submitted, X was organized under the laws of State and made a valid S election, effective D1. LLC was organized under the laws of State on D2. X merged with LLC, the surviving entity on D2. LLC represents that the merger qualified for tax-free treatment under § 368(a)(1)(F). LLC intended at all times to be treated as an S corporation for federal tax purposes, effective D2. However, LLC, inadvertently did not file an entity classification election to be treated as a corporation

for federal tax purposes or an election to be treated as an S corporation for federal tax purposes.

### Law and Analysis

#### *Entity Classification Election*

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an “eligible entity”) can elect its classification for federal tax purposes. A “business entity” is an entity recognized for federal tax purposes that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Code. Section 301.7701-2(a). An eligible entity with at least two members can elect either to be classified as an association (and thus a corporation under § 301.7701-2(b)(2)) or as a partnership.

Section 301.7701-3(b)(1)(ii) provides that unless a domestic eligible entity elects otherwise, the entity is a partnership if it has two or more members.

To elect to be classified other than as provided in § 301.7701-3(b), an eligible entity must file Form 8832, Entity Classification Election, with the designated service center. Section 301.7701-3(c)(1)(i). An election will be effective on the date specified on the Form 8832 or on the date filed if no such date is specified. The effective date specified on Form 8832 cannot be more than 75 days prior to the date the election is filed. Section 301.7701-3(c)(2)(iii).

Section 301.9100-1(c) allows the Commissioner to grant a reasonable extension of time for making a regulatory election under the rules set forth in §§ 301.9100-2 and 301.9100-3. Section 301.9100-1(b) defines a regulatory election as an election having a due date prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions for time for making elections that do not meet the requirements of § 301.9100-2.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. Section 301.9100-3(a).

#### *Subchapter S Election*

Section 1361(a) provides that the term S corporation means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1361(b)(1)(B) provides that the term “small business corporation” means a domestic corporation that is not an ineligible corporation and that does not have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual.

Section 1362(d)(2) provides that an election under § 1362(a) is terminated whenever at any time on or after the first day of the first taxable year for which the corporation is an S corporation, the corporation ceases to be a small business corporation.

Rev. Rul. 64-250, 1964-2 C.B. 333, held that a reorganization under § 368(a)(1)(F) did not cause a termination of an election under former section 1372, the predecessor to section 1362. In that revenue ruling, an electing small business corporation within the meaning of former section 1372(b) was reincorporated in another state when the corporation’s shareholders organized a new corporation in the other state and merged the existing corporation into the new corporation. The revenue ruling states that the surviving corporation also met the requirements for qualification as a small business corporation.

### Conclusion

Based solely on the facts submitted and the representations made we conclude that LLC has satisfied the requirements of section 301.9100-3. As a result, LLC is granted an extension of time of sixty (60) days from the date of this letter to make an election to treat LLC as an association for federal tax purposes, effective D2. The election should be made by filing Form 8832 with the appropriate service center. A copy of this letter should be attached to the election.

In addition, provided that the merger of X and LLC, on D2, constitutes a tax-free reorganization under § 368(a)(1)(F) of the Code, we conclude the following:

- (1) The reorganization under § 368(a)(1)(F) will not adversely affect LLC’s status as an S corporation.
- (2) Provided that LLC meets the requirements of a small business corporation under § 1361, X’s election under § 1362(a) to be an S corporation will continue in effect and be applicable to LLC without the necessity of filing a new election on behalf of LLC.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed as to whether the original election made by X to be an S corporation was a valid election under § 1362 and whether the merger transaction described above was a reorganization under § 368(a)(1)(F).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3)

provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent your tax representative.

Sincerely,  
**/s/ Heather C. Maloy**  
Heather C. Maloy  
Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures (2)  
Copy of this letter  
Copy for § 6110 purposes